

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

AILA CURTIS, et al.,

Plaintiffs,

v.

PEACEHEALTH, LIZ DUNNE, DOUG  
KOEKKOEK,

Defendants.

CASE NO. 3:23-cv-05741-RJB

ORDER ON PEACEHEALTH  
DEFENDANTS' MOTION TO  
DISMISS

This matter comes before the Court on PeaceHealth, Liz Dunne, and Doug Koekkoek's (collectively "PeaceHealth" or "PeaceHealth Defendants") Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. 30) and Plaintiffs' motion for judicial notice (Dkt. 36). Oral argument has been requested but is unnecessary to decide the motions. The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

This case arises from Defendants' COVID-19 vaccine mandates for healthcare workers. Dkt. 8. The healthcare worker Plaintiffs contend that the Defendants violated Plaintiffs' constitutional and international treaty rights, federal statutory rights, and that Defendants

1 breached a contract and committed various state torts in connection with their “unlawful,  
2 malicious, unequal and contractually violative COVID-19 investigational drug mandate[s].” *Id.*  
3 at 2.

4 All claims against Washington State Governor Jay Robert Inslee were dismissed on  
5 December 21, 2023. Dkt. 32. The PeaceHealth Defendants now move to dismiss the claims  
6 against them pursuant to Fed. R. Civ. P. (“Rule”) 12(b)(6). Dkt. 30. The Plaintiffs also move  
7 the Court to take judicial notice of a letter and a declaration filed in an out-of-district case. Dkt.  
8 36. For the reasons provided below, the motion for judicial notice (Dkt. 36) should be granted  
9 and the motion to dismiss (Dkt. 30) should be granted, as to the federal claims, and renoted as to  
10 the state law claims.

11 **I. MOTION FOR JUDICIAL NOTICE, PROCEDURAL HISTORY AND FACTS**

12 **A. MOTION FOR JUDICIAL NOTICE**

13 Pursuant to Federal Rule of Evidence 201(b): “[t]he court may judicially notice a fact that  
14 is not subject to reasonable dispute because it: (1) is generally known within the trial court’s  
15 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose  
16 accuracy cannot be reasonably questioned.”

17 The Plaintiffs move the Court to take judicial notice of facts in a letter, dated August 23,  
18 2021, from the United States Food and Drug Administration (“FDA”) to Pfizer Inc. (Dkt. 36-1)  
19 and facts in the Declaration of Peter Marks, M.D. Ph.D. dated January 14, 2022 (36-2). Dkt. 36.

20 **Letter.** In the December 21, 2023 order that dismissed all claims against Gov. Inslee, the  
21 Court took judicial notice of facts in the August 23, 2021 letter. Dkt. 32. Accordingly,  
22 Plaintiffs’ motion regarding that letter (Dkt. 36) should be granted.  
23  
24

1           **Declaration of Dr. Marks.** The Plaintiffs’ motion for the Court to take judicial notice of  
2 facts in Dr. Mark’s Declaration (Dkt. 36) should be granted.

3           Dr. Marks, who at that time was the FDA’s Director of the Center for Biologics  
4 Evaluation and Research (“CBER”), prepared his declaration for *Coker v. Austin*, U.S. Dist.  
5 Court for the Northern Dist. of Florida case number 21-1211 AW-HTC. Dkt. 36-2. His  
6 declaration states that it was based, in part, on information available to him in his official  
7 capacity, and that in his official capacity as CBER Director, he was “fully familiar with [*Coker*]  
8 and the facts stated [therein].” Dkt. 36-2 at 1-2. While no such showing that he is familiar with  
9 the facts of this case is made, facts relevant to this case in his declaration “can be accurately and  
10 readily determined from sources whose accuracy cannot be reasonably questioned.” In any  
11 event, the relevant facts in Dr. Marks’ Declaration are unhelpful to the Plaintiffs as will be  
12 discussed more thoroughly below in Section I.C.

### 13           **B. PROCEDURAL HISTORY**

14           **Parties.** The Plaintiffs are current and former PeaceHealth employees who filed a  
15 lengthy complaint on August 18, 2023. Dkt. 1. Although there are over 80 Plaintiffs, this is not  
16 a class action. The defendants were/are Gov. Inslee, PeaceHealth, a not-for-profit healthcare  
17 system headquartered in Clark County, Washington, and officers of PeaceHealth, Liz Dunne and  
18 Doug Koekkoek. *Id.*

19           **Amended Complaint.** The Amended Complaint asserts federal claims against the  
20 Defendants for: (1) violation of the Fourteenth Amendment’s equal protection rights, (2)  
21 violation of the Fourteenth Amendment’s due process rights, (3) violation of the “Spending  
22 Clause Doctrine,” (4) “Subjected to Investigational Drug Use,” pursuant to 42 U.S.C. § 1983, (5)  
23 “Unconstitutional Conditions Doctrine,” (6) “Implied Right of Action 21 U.S.C. § 360bbb-3;” a  
24

1 provision of the Federal Food, Drug, and Cosmetic Act (“FDCA”), and state law claims for (7)  
 2 breach of contract, (third party beneficiary), (8) “employment torts,” (9) outrage, and (10)  
 3 invasion of privacy and defamation of character. Dkt. 8 at 57-70.

4 **Order Granting Gov. Inslee’s Motion to Dismiss.** On December 21, 2023, Gov.  
 5 Inslee’s motion to dismiss was granted and all claims asserted against him were dismissed. Dkt.  
 6 32. That order further granted Gov. Inslee’s motion for judicial notice that: on August 23, 2021,  
 7 the Pfizer-BioNTech vaccine received full FDA approval for individuals 16 and older. *Id.* This  
 8 order adopts the reasoning (*Id.*) regarding that finding. As was the case in the December 21,  
 9 2023 order, this order does not credit allegations in the Amended Complaint that the only  
 10 available vaccines at the relevant time were “investigational” or “experimental.” *Id.*; *Gonzalez v.*  
 11 *Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014)(holding that although  
 12 for purposes of a motion to amend or for a motion to dismiss the court ordinarily credits the  
 13 allegations in the complaint as true, it need not “accept as true allegations that contradict matters  
 14 properly subject to judicial notice,” or in a complaint’s attachment, or incorporated by reference  
 15 into the complaint).

16 The December 21, 2023 order dismissed the Plaintiffs federal constitutional claims  
 17 asserted against Gov. Inslee because they failed to allege sufficient properly credited facts in the  
 18 Amended Complaint to assert a claim for violation of their equal protection, substantive due  
 19 process or procedural due process rights. Dkt. 32 at 8-10. It further found that there was no  
 20 private cause of action under the spending clause doctrine. *Id.* As to the Plaintiffs’ “subjected to  
 21 investigational drug use,” claim, which referred to 21 U.S.C. § 360bbb-3, 45 C.F.R. Part 46, the  
 22 Belmont Report, Article VI of the International Covenant on Civil and Political Rights  
 23 (“ICCPR”) Treaty, 10 U.S.C. § 980, Federal Wide Assurance, and the CDC COVID-19  
 24

Vaccination Program Provider Agreement, the December 21, 2023 order held that these laws/report/treaty were inapplicable and there was no private cause of action under any of these against Gov. Inslee. *Id.* at 11-13. The December 21, 2023 order held that the Plaintiffs failed to allege sufficient facts for which relief could be granted on their “unconstitutional conditions doctrine claim.” *Id.* It further held that Gov. Inslee was entitled to qualified immunity. *Id.* at 13-15. This order adopts the reasoning from the December 21, 2023 order on all federal claims. The state law claims against Gov. Inslee were also dismissed. *Id.*

### C. BACKGROUND FACTS RELEVANT TO PEACEHEALTH’S MOTION

The background facts are taken from the Amended Complaint, its attachments, and facts subject to judicial notice. *Gonzalez* at 1115. Where judicial notice has been, or is now taken, it will be designated. Additionally, some general background information will be taken from court decisions.

#### 1. COVID-19, Emergency Use Authorizations for Vaccines, and Vaccine Program

COVID–19 is a “highly contagious, dangerous, and . . . deadly disease.” *Biden v. Missouri*, 595 U.S. 87, 93 (2022). The COVID-19 pandemic posed significant challenges for federal and state governments. Dkt. 8. Beginning in February of 2020, Gov. Inslee declared a state of emergency and issued several public health and safety proclamations. *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1227 (9th Cir. 2022).

In December of 2020, the FDA granted emergency use authorization (“EAU”) for the Pfizer-BioNTech (“Pfizer-BioNTech”) two-dose mRNA vaccine for individuals 16 and older and for the Moderna two-dose mRNA vaccine for individuals 18 years and older. Dkt. 8. On December 21, 2020, Pfizer-BioNTech received conditional marketing authorization in the European Union

1 for its COVID-19 vaccine, marketed as COMIRNATY®. *Id.* On February 27, 2021, the FDA  
2 granted EAU for the Johnson & Johnson vaccine for individuals 18 and older. *Id.*

3 The Amended Complaint alleges that PeaceHealth voluntarily agreed to participate in the  
4 Center for Disease Control and Prevention’s (“CDC”) COVID-19 Vaccination Program. Dkt. 8  
5 at 20. Attached to the Amended Complaint is a blank “CDC COVID-19 Vaccination Program  
6 Provider Agreement” (sometimes referred to herein as “Provider Agreement”) (Dkt. 8-1) that the  
7 Plaintiffs allege PeaceHealth signed (Dkt. 8 at 20). *Id.* This Provider Agreement states that it  
8 was an agreement between the CDC and the organization, like PeaceHealth, who agreed to  
9 administer COVID-19 vaccines. Dkt. 8-1 at 2. The agreement requires certain conduct like: a  
10 vaccine provider would administer the vaccines in accordance with all CDC requirements and  
11 recommendations, make a record, report vaccine administration data, not sell the vaccines,  
12 provide fact sheets to those they vaccinate, handle the vaccines “under proper conditions,  
13 including maintaining cold chain conditions,” report adverse reactions and provide vaccine  
14 record cards. *Id.*

15 The Amended Complaint does not assert that the PeaceHealth Defendants administered a  
16 COVID-19 vaccine (whether experimental or not) on any of the Plaintiffs. Dkt. 8. It does not  
17 allege that PeaceHealth required its employees to get a COVID-19 vaccine from PeaceHealth.  
18 *Id.*

19 Even after vaccines became available, the pandemic continued, with the virus mutating  
20 into various strains. *Does I-6 v. Mills*, 16 F.4th 20, 26 (1st Cir. 2021)(*cert. denied sub nom.*  
21 *Does I-3 v. Mills*, 142 S. Ct. 1112 (2022)). In the United States, the summer of 2021 saw the  
22 emergence of a highly contagious COVID variant referred to as the “Delta” variant. *Id.* COVID  
23 cases, hospitalizations and deaths rose sharply. CDC, *COVID Data Tracker*,  
24

1 [https://covid.cdc.gov/covid-data-tracker/#trends\\_weeklyhospitaladmissions\\_select\\_00](https://covid.cdc.gov/covid-data-tracker/#trends_weeklyhospitaladmissions_select_00) (last  
 2 visited December 13, 2023); [https://covid.cdc.gov/covid-data-](https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00)  
 3 [tracker/#trends\\_weeklydeaths\\_select\\_00](https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00) (last visited December 13, 2023).

4 2. Gov. Inslee’s Proclamation, Approval of the Pfizer-BioNTech Vaccine,  
 5 PeaceHealth’s Policy, and Federal Government’s Rule

6 On August 20, 2021, Gov. Inslee issued Proclamation 21-14.1, “Covid-19 Vaccination  
 7 Requirement,” (“Proclamation”) which required state workers, workers in an education setting,  
 8 and healthcare providers to be fully vaccinated by October 18, 2021, unless they qualified for  
 9 medical or religious exemptions. Dkt. 8-7.

10 On August 23, 2021, the Pfizer-BioNTech vaccine received full FDA approval for  
 11 individuals 16 and older. Dkt. 32. (*citing FDA Approval Letter* (August 23, 2021),  
 12 <http://www.fda.gov/media/151710/download> (last visited December 13, 2023); *FDA News*  
 13 *Release* (August 23, 2021), [https://www.fda.gov/news-events/press-announcements/fda-](https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine)  
 14 [approves-first-covid-19-vaccine](https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine) (last visited December 13, 2023); *Pfizer-BioNTech COVID-19*  
 15 *Vaccine Overview and Safety (also known as COMIRNATY®), Ctrs For Disease Control &*  
 16 *Prevention* (Oct. 28, 2021), <https://stacks.cdc.gov/view/cdc/111109> (*emphasis in original*) (last  
 17 visited December 13, 2023); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 283 (2d Cir.  
 18 2021); *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1241 (D. Or. 2021)).

19 The Plaintiffs argue that the Court should take judicial notice of facts in Dr. Marks’  
 20 Declaration. Dkt. 36. In his declaration, Dr. Marks states that there are some “legal” differences  
 21 between the Pfizer-BioNTech vaccine and COMIRNATY® while fully acknowledging that the  
 22 “medical formulation” is the same and that both products are “made by the same manufacturer  
 23 under current good manufacturing practice requirements.” Dkt. 36-2 at 5. He points out that  
 24 COMIRNATY® is labeled in one manner and the Pfizer-BioNTech vaccine is labeled

1 differently. Dkt. 36-2 at 5. That the labels are different is a fact that “can be accurately and  
 2 readily determined from sources whose accuracy cannot be reasonably questioned” and so is  
 3 judicially noticed here. However, a difference in labeling does not change the outcome of this  
 4 case.

5 In any event, on August 30, 2021, PeaceHealth issued its “COVID-19 Vaccine  
 6 Requirement Policy” (sometimes referred to herein as “Policy”). Dkt. 8-2. Like Gov. Inslee’s  
 7 Proclamation, this Policy required that PeaceHealth employee healthcare workers be “fully  
 8 vaccinated against COVID-19” subject to medical or religious exemptions. *Id.* October 15,  
 9 2021 was set as the compliance date for full vaccination or approval of an exemption under  
 10 PeaceHealth’s Policy. *Id.*

11 After the deadlines set in both the Proclamation and Policy, on November 5, 2021, the  
 12 U.S. Secretary of Health and Human Services “issued an interim final rule amending the existing  
 13 conditions of participation in Medicare and Medicaid to add a new requirement—that facilities  
 14 ensure that their covered staff are vaccinated against COVID–19.” *Biden v. Missouri*, 595 U.S.  
 15 87, 91 (2022)(citing 86 Fed. Reg. 61561, 61616–61627). Under this rule, Medicare and Medicaid  
 16 program participants like PeaceHealth must require medical staff be vaccinated against COVID-  
 17 19 unless medical and/or religious exemptions are appropriate. *Id.* Further, “[a] facility’s failure  
 18 to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately  
 19 termination of participation in the programs.” *Id.* On January 13, 2022, the United States  
 20 Supreme Court upheld the rule. *Id.*

## 21 II. DISCUSSION

### 22 A. MOTION TO DISMISS STANDARD

23  
 24



1 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a  
 2 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
 3 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material allegations  
 4 are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*,  
 5 717 F.2d 1295 (9<sup>th</sup> Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss  
 6 does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his  
 7 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the  
 8 elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55  
 9 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level,  
 10 on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*  
 11 at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its  
 12 face." *Id.* at 547.

### 13 **B. FEDERAL CLAIMS MADE PURSUANT TO SECTION 1983**

14 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the  
 15 conduct complained of was committed by a person acting under color of state law, and that (2)  
 16 the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or  
 17 laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*  
 18 *grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to  
 19 remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769  
 20 F.2d 1350, 1354 (9<sup>th</sup> Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

#### 21 1. Whether the PeaceHealth Defendants Acted Under the Color of Law - State 22 Actor?

23 The PeaceHealth Defendants contend that the Plaintiffs' federal claims, asserted pursuant  
 24 to § 1983 should be dismissed because they did not act "under the color of law," that is, as state

1 actors. Before the Court can answer the question of whether the PeaceHealth Defendants acted  
2 as a state actor, the Court “must identify the specific conduct” of which the Plaintiffs complain.  
3 *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020).

4 In the Amended Complaint and their response, the Plaintiffs engage in lengthy  
5 discussions about PeaceHealth’s obligations as an entity that gives COVID-19 vaccines. Dkts. 8  
6 and 36. The Plaintiffs frequently conflate PeaceHealth’s obligations as an entity that administers  
7 vaccines with PeaceHealth’s actions as an employer. The Plaintiffs’ arguments related to the  
8 PeaceHealth Defendants’ role as an entity that gives COVID-19 vaccines are not relevant to  
9 whether it was a state actor for its § 1983 based claims. The Amended Complaint does not  
10 allege that PeaceHealth gave them a COVID-19 vaccine or forced the Plaintiffs to receive a  
11 COVID-19 vaccine from PeaceHealth. *Id.* The Plaintiffs fail to allege that they were injured in  
12 any manner by PeaceHealth in its role as an entity that administered COVID-19 vaccines.

13 The Plaintiffs contend that they were injured (fired) as a result of PeaceHealth’s actions  
14 in its role as an employer. Dkt. 8. More specifically, in their Amended Complaint, the Plaintiffs  
15 seek to hold the PeaceHealth Defendants liable for their Policy that the Plaintiffs receive a  
16 COVID-19 vaccination before October 15, 2021, subject to medical and religious exemptions, or  
17 face being fired. *Id.* The relevant inquiry here, then, is whether the PeaceHealth Defendants’  
18 role as an employer requiring their employees to receive a COVID-19 vaccine, subject to  
19 exemptions, constituted state action.

20 Four general tests may be used in identifying state action: (1) public function; (2) joint  
21 action; (3) governmental nexus; and (4) governmental compulsion or coercion. *Rawson* at 747.

1 Compliance with generally applicable laws is not sufficient to convert private conduct into state  
2 action under any of the four tests. *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1013 (9th Cir.  
3 2020).

4 The conduct of which Plaintiffs complain was merely PeaceHealth’s compliance with a  
5 generally applicable law – Gov. Inslee’s Proclamation. Accordingly, it did not constitute state  
6 action. *Zimmerman v. PeaceHealth*, 2023 WL 7413650, at \*13 (W.D. Wash. Nov. 9, 2023). In  
7 *Zimmerman*, 50 current and former PeaceHealth employees filed a lawsuit in this district, in part  
8 arguing that PeaceHealth failed to properly grant them religious accommodations after having  
9 been granted an exemption from PeaceHealth’s COVID-19 vaccine policy (the same policy that  
10 is at issue here). *Id.* The *Zimmerman* Plaintiffs also argued that PeaceHealth acted as a state  
11 actor and that PeaceHealth’s COVID-19 vaccine policy constituted “arbitrary and capricious  
12 government action.” *Id.* On November 9, 2023, the court dismissed the *Zimmerman* Plaintiffs’  
13 “arbitrary and capricious” claim, finding that PeaceHealth’s enforcement of its COVID-19  
14 vaccine policy did not constitute state action. *Id.* at 12-23. *Zimmerman*’s finding is persuasive  
15 and applies here.

16 As stated in *Zimmerman*, the Plaintiffs have failed to demonstrate that PeaceHealth’s  
17 enforcement of its Policy was a public function (state action test (1)) because they did not  
18 demonstrate that the function at issue was “both traditionally and exclusively governmental.”  
19 *Rawson* at 755 (*cleaned up*)(public function test satisfied only where function is “both  
20 traditionally and exclusively governmental”). The Plaintiffs did not establish that PeaceHealth’s  
21 enforcement of its COVID-19 vaccine policy constituted joint action (state action test (2)) or that  
22 it had a sufficient governmental nexus (state action test (3)). *Zimmerman* at 13. Lastly, they did  
23 not show that PeaceHealth’s enforcement of its Policy was a result of governmental compulsion  
24

1 or coercion (state action test (4)). *Id.* Governmental compulsion in the form of a generally  
 2 applicable law, without more, is not sufficient to deem a private entity a governmental actor.  
 3 *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 (9th Cir. 1999). “Instead, the  
 4 plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the  
 5 private entity.” *Id.* This the Plaintiffs have not done. The Plaintiffs have failed to demonstrate  
 6 that the PeaceHealth Defendants were state actors.

7                   2. Whether PeaceHealth Deprived Plaintiffs of a Federal Constitutional or  
 8                   Statutory Right?

9                   Even if the PeaceHealth Defendants were state actors, the Plaintiffs have failed to allege  
 10 sufficient creditable facts to state a claim for relief for all claims asserted under § 1983.

11                   *a. Equal Protection Claim*

12                   The Equal Protection Clause provides that, “[n]o state shall ... deny to any person within  
 13 its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1. “The Equal  
 14 Protection Clause ensures that ‘all persons similarly situated should be treated alike.’” *Engquist*  
 15 *v. Oregon Dep’t of Agric.*, 478 F.3d 985, 992 (9th Cir. 2007).

16                   Plaintiffs raise a “class of one” equal protection claim, alleging that they were treated  
 17 differently than other, similarly situated groups. While they argue that they are members of a  
 18 suspect class, the Plaintiffs fail to support that contention with any authority or rationale.  
 19 Accordingly, to assert a “class of one” equal protection claim, the Plaintiffs must demonstrate  
 20 that the PeaceHealth Defendants: (1) intentionally (2) treated them differently than other  
 21 similarly situated groups, (3) without a rational basis. *Seaplane Adventures, LLC v. Cnty. of*  
 22 *Marin*, 71 F.4th 724, 729 (9th Cir. 2023). Because the Plaintiffs fail to allege sufficient facts  
 23 regarding the third requirement, the Court need not reach the remaining two requirements.  
 24

1 In the December 21, 2023 order granting Gov. Inslee’s motion to dismiss, this Court held  
 2 that Gov. Inslee had a rational basis for issuance of the Proclamation. Dkt. 32 at 9. The  
 3 PeaceHealth Defendants’ Policy mirrored Gov. Inslee’s Proclamation. Accordingly, even if the  
 4 PeaceHealth Defendants were state actors, they did not violate the Plaintiffs’ equal protection  
 5 rights because there was a rational basis for the Policy. This claim should be dismissed.

6 *b. Substantive and Procedural Due Process*

7 “The Fourteenth Amendment’s Due Process Clause protects persons against deprivations  
 8 of life, liberty, or property.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

9 **Substantive Due Process.** The December 21, 2023 order held that COVID-19 vaccine  
 10 mandates do not implicate a fundamental right protected by the substantive due process clause  
 11 and so rational basis review applies to the Plaintiffs’ substantive due process claims. Dkt. 32 at  
 12 10. As stated in Section II.B.2.a. above, the Plaintiffs have not alleged sufficient facts from  
 13 which to conclude that PeaceHealth did not have a rational basis for its Policy. Their substantive  
 14 due process claim should be dismissed.

15 **Procedural Due Process.** “A procedural due process claim has two elements: (1) a  
 16 deprivation of a constitutionally protected liberty or property interest, and (2) a denial of  
 17 adequate procedural protections.” *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th  
 18 Cir. 2021). The Plaintiffs fail to point to facts, which if believed, would demonstrate that they  
 19 were denied “adequate procedural protections” from the PeaceHealth Defendants. They fail to  
 20 point to procedural protections that they were due but did not receive. This claim should be  
 21 dismissed.

22 *c. Spending Clause Doctrine Claim*

23

24

1 The Spending Clause of the U.S. Constitution places some limits on the federal  
 2 government's ability to condition use of federal funds. *S. Dakota v. Dole*, 483 U.S. 203, 206  
 3 (1987). The Plaintiffs fail to point to any authority that the spending clause doctrine places  
 4 limits on PeaceHealth's enforcement of a COVID-19 vaccine mandate. This claim should be  
 5 dismissed.

6 *d. "Subjected to Investigational Drug Use Claim"*

7 As it relates to this claim, the Plaintiffs refer to 21 U.S.C. § 360bbb-3, 45 C.F.R. Part 46,  
 8 the Belmont Report, Article VI of the ICCPR Treaty, 10 U.S.C. § 980, Federal Wide Assurance,  
 9 and the CDC COVID-19 Vaccination Program Provider Agreement. Dkt. 8.

10 As was the case against Gov. Inslee, the Plaintiffs fail to show that any of the federal  
 11 statutes, regulations, reports or international treaties they cite in their Amended Complaint apply  
 12 and/or that they contain a private cause of action that is available against the PeaceHealth  
 13 Defendants here.

14 **21 U.S.C. § 360bbb-3.** As is relevant here, 21 U.S.C. § 360bbb-3(e)(1)(A)(ii), which  
 15 governs emergency use authorization of medication, requires that the Secretary of the U.S. Dept.  
 16 of Health and Human Services establish:

17 Appropriate conditions designed to ensure that individuals to whom the product is  
 18 administered are informed--

19 (I) that the Secretary has authorized the emergency use of the product;

20 (II) of the significant known and potential benefits and risks of such use, and of  
 the extent to which such benefits and risks are unknown; and

21 (III) of the option to accept or refuse administration of the product, of the  
 22 consequences, if any, of refusing administration of the product, and of the  
 23 alternatives to the product that are available and of their benefits and risks.  
 24

1 This statute does not apply to PeaceHealth's enforcement of the Policy. The statute  
 2 directs the Secretary of the U.S. Dept. of Health and Human Services' actions and those of  
 3 entities administering a vaccine vis-à-vis someone to whom they are administering the vaccine.  
 4 It does not apply to a private employer's enforcement of a vaccine mandate.

5 Further, there is no private right of action under 21 U.S.C. § 360bbb-3 (e)(1)(A). *Navy*  
 6 *Seal I v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021)(holding that 21 U.S.C. § 360bbb-3  
 7 (e)(1)(A)'s "option to accept or refuse" an emergency vaccine confers no private right of action,  
 8 creates no opportunity to sue the government, and permits enforcement by the United States and  
 9 by the states in specific circumstances only); *Doe v. Franklin Square Union Free Sch. Dist.*, 568  
 10 F.Supp.3d 270, 292 (E.D.N.Y. 2021); *Bird v. Martinez-Ellis*, 22-8012, 2022 WL 17973581, at \*5  
 11 (10th Cir. Dec. 28, 2022). As stated below in Section II.B.2.f., no private right of action should  
 12 be implied for § 360bbb-3(e)(1)(A). While Plaintiffs argue that § 1983 provides them a private  
 13 right of action, § 1983 "merely provides a mechanism for enforcing individual rights 'secured'  
 14 elsewhere, i.e., rights independently 'secured by the Constitution and laws' of the United States."  
 15 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). Plaintiffs still must demonstrate that they have  
 16 a private right of action under a statute. *Id.* The Plaintiffs have failed to do so here.

17 Moreover, the Plaintiffs could have received an FDA-authorized vaccine, so § 360bbb-3  
 18 (e)(1)(A) does not apply to PeaceHealth's enforcement of its vaccine policy. To the extent the  
 19 Plaintiffs assert a claim under the statute, it should be dismissed.

20 **45 C.F.R. Part 46, The Belmont Report, Article VI of the ICCPR.** As was noted in  
 21 the December 21, 2023 order, there is no private right of action under 45 C.F.R. Part 46, the  
 22 Belmont Report, or the ICCPR. Dkt. 32 at 12. The Plaintiffs claims based on 45 C.F.R. Part 46,  
 23  
 24

1 The Belmont Report, Article VI of the ICCPR should be dismissed for lack of a cognizable legal  
2 theory.

3 **10 U.S.C. § 980.** Under 10 U.S.C. § 980(a)(1), “funds appropriated to the Department of  
4 Defense may not be used for research involving a human being as an experimental subject  
5 unless. . . the informed consent of the subject is obtained in advance . . .”

6 The Plaintiffs have failed to allege sufficient creditable facts from which they could  
7 obtain relief from PeaceHealth based on § 980(a)(1). There is no allegation that PeaceHealth  
8 expended Department of Defense funds. This claim should be dismissed.

9 **Federal Wide Assurance.** According to the Amended Complaint, through Federal Wide  
10 Assurance, “an institution commits to the [U.S. Dept. of Health and Human Services] that it will  
11 comply with the requirements in the [U.S. Dept. of Health and Human Services’] Protection of  
12 Human Subjects regulations at 45 C.F.R. Part 46.” Dkt. 8 at 30, n. 23.

13 Federal wide assurance does not apply here – it applies to institutions “engaged in  
14 research . . .” 45 C.F.R. § 46.103(a). There are no properly credited allegations that  
15 PeaceHealth was engaged in research in its enforcement of the Policy. Further, the Plaintiffs fail  
16 to point to any authority that there is a private cause of action for Federal Wide Assurance. The  
17 claim should be dismissed.

18 **The CDC COVID-19 Vaccination Program Provider Agreement.** The Amended  
19 Complaint alleges that in signing the Provider Agreement, PeaceHealth agreed to comply with  
20 “the conditions specified in this agreement.” Dkt. 8 at 38. The Amended Complaint contends  
21 that “‘compliance with the conditions specified in this agreement’ extends under 21 U.S.C. §  
22 360bbb-3 to Plaintiffs’ ‘option to accept or refuse.’” *Id.*



1 The Plaintiffs' claim pursuant to the Provider Agreement, brought under § 1983, should  
2 be dismissed for failure to state a claim. The Provider Agreement arguably creates obligations  
3 for PeaceHealth to people to whom it administers COVID-19 vaccines. According to the  
4 allegations in the Amended Complaint, the Plaintiffs did not receive a COVID-19 vaccine from  
5 PeaceHealth. The Plaintiffs have not shown that they are entitled to relief under the Provider  
6 Agreement because the Provider Agreement does not apply to them. The Plaintiffs arguments  
7 and contentions related to the Provider Agreement conflate PeaceHealth's obligations to people  
8 to whom it administers COVID-19 vaccines, with PeaceHealth's actions as an employer. It is  
9 PeaceHealth's actions as an employer that are relevant here and there is no logical connection  
10 between PeaceHealth's employment decisions and its agreement to be bound by requirements in  
11 the Provider Agreement.

12 Moreover, even if it did somehow apply, the Plaintiffs cite no authority that they are  
13 entitled to enforce a contract – the Provider Agreement - between the federal government and  
14 PeaceHealth on a matter (failure to comply with § 360bbb-3) which is unrelated to their claimed  
15 harm (being fired for failing to comply with the vaccine Policy). Even assuming the Plaintiffs  
16 could claim some benefit from the Provider Agreement, “[p]arties that benefit from a [federal]  
17 government[al] contract are generally assumed to be incidental beneficiaries, and may not  
18 enforce the contract absent a clear intent to the contrary.” *Klamath Water Users Protective Ass'n*  
19 *v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)(opinion amended on denial of reh'g on  
20 unrelated issue, 203 F.3d 1175 (9th Cir. 2000)). The Plaintiffs fail to point to any clear intent in  
21 either the Provider Agreement that they are any more than incidental beneficiaries. Accordingly,  
22 they are not entitled to enforce the Provider Agreement. *Klamath Water* at 1211.

1 The Amended Complaint alleges that the Provider Agreement “clearly and  
 2 unambiguously create rights enforceable pursuant to 42 U.S.C. 1983.” Dkt. 8 at 57. The  
 3 Plaintiffs fail to explain this assertion or point to an authority that supports it. Section 1983  
 4 merely provides an enforcement mechanism of rights that exist pursuant to federal law.  
 5 *Gonzaga* at 285. As stated above in Section II.B.2.d, there is no privately enforceable right  
 6 available under 21 U.S.C. § 360bbb-3 and the Plaintiffs have not shown that they have a  
 7 privately enforceable right pursuant to the Provider Agreement. This claim should be dismissed.

8 *e. Unconstitutional Conditions Doctrine Claim*

9 The unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights  
 10 by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns*  
 11 *River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). It prohibits the government from denying a  
 12 person a benefit because they exercise a constitutional right. *Id.*

13 The Amended Complaint acknowledges that the Plaintiffs are “at will” employees of a  
 14 private employer - PeaceHealth. Dkt. 8. Accordingly, they fail to plead sufficient facts to allege  
 15 that a government benefit has been denied. The Plaintiffs unconstitutional conditions doctrine  
 16 claim should be dismissed. *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553,  
 17 566 (W.D. Va. 2022)(University’s COVID-19 vaccine mandate challenger failed to allege  
 18 violation of unconstitutional conditions doctrine because no government benefit was at issue).

19 *f. Implied Right of Action for the FDCA Provision Found at 21 U.S.C. §*  
 20 *360bbb-3*

21 As stated above, there is no private right of action under 21 U.S.C. § 360bbb-3(e)(1)(A).  
 22 *Navy Seal I* at 1030; *Doe* at 292. The Plaintiffs assert that a private cause of action should be  
 23 implied under this provision of the FDCA.  
 24

Although courts used to use a four factor test to determine whether a private cause of action should be implied, the Supreme Court collapsed the prior test “into a single focus: the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.” *Saloojas, Inc. v. Aetna Health of California, Inc.*, 80 F.4th 1011, 1014 (9th Cir. 2023). The enforcement provisions of the FDCA are in 21 U.S.C. § 337. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010). The plain language of § 337 expressly forbids private parties from bringing enforcement suits for violations of the FDCA. *Id.*; *Bird v. Martinez-Ellis*, 2022 WL 17973581, at \*5 (10th Cir. Dec. 28, 2022)(citing 21 U.S.C. § 337(a) “[e]xcept [certain enforcement actions that may be brought by a State in its own name], all ... proceedings for the enforcement, or to restrain violations, of this Chapter shall be by and in the name of the United States” in holding that there was no actionable claim for violation of § 360bbb-3 of the FDCA to challenge prison’s COVID-19 vaccine practices). That Congress chose to include an enforcement mechanism in the FDCA that is limited to actions by a State in its own name or the United States “cuts strongly against” a finding of intent to create a private cause of action. *Saloojas* at 1016. The Plaintiffs offer no rational argument to the contrary. Their implied right of action 21 U.S.C. § 360bbb-3(e)(1)(A) claim should be dismissed.

**C. EXERCISE OF SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS, ORDER TO SHOW CAUSE, AND RENOTING PORTION OF MOTION TO DISMISS**

Pursuant to 28 U.S.C. § 1367 (c), district courts may decline to exercise supplemental jurisdiction over state law claims if: (1) the claims raise novel or complex issues of state law, (2) the state claims substantially predominate over the claim which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

1 “While discretion to decline to exercise supplemental jurisdiction over state law claims is  
2 triggered by the presence of one of the conditions in § 1367 (c), it is informed by the values of  
3 economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999,  
4 1001 (9th Cir. 1997)(*internal citations omitted*).

5 Here, two of the four conditions in § 1367(c) are present. All Plaintiffs’ claims against  
6 Gov. Inslee have been dismissed (Dkt. 32) and, by this order, all Plaintiffs’ remaining federal  
7 claims are dismissed. Accordingly, this Court has “dismissed all claims over which it has  
8 original jurisdiction,” and so has discretion to decline to exercise supplemental jurisdiction over  
9 the state law claims under § 1367(c)(3). Moreover, the remaining state claims “raise novel or  
10 complex issues of state law” under § 1367(c)(1). These are issues for which the state court is  
11 uniquely suited. Because state courts have a strong interest in enforcing their own laws, *See*  
12 *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 (1988), the value of comity is served by  
13 this Court declining jurisdiction. Further, the values of economy, convenience, and fairness may  
14 well be served by this Court’s declining to exercise supplemental jurisdiction. *See Acri* at  
15 1001.

16 Accordingly, by February 2, 2024, the parties should be ordered to show cause, in  
17 writing, if any they have, why the Court should not decline to exercise supplemental jurisdiction  
18 and should not dismiss the remaining state law claims without prejudice. To the extent the  
19 PeaceHealth’s motion to dismiss relates to state law claims, that motion (Dkt. 30) should be  
20 renoted for February 2, 2024. If the Court retains supplemental jurisdiction over the state law  
21 claims, PeaceHealth’s motion to dismiss the state law claims (Dkt. 30) will be addressed.

### 22 III. ORDER

23 Therefore, it is hereby **ORDERED** that:  
24

- The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Robert Bryan

ORDER ON PEACEHEALTH DEFENDANTS' MOTION TO DISMISS - 21